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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE YANKTON SIOUX TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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Washington, D.C. 20530

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STATEMENT

The only question presented to this Court is whether the Court of Claims correctly affirmed the final decision of the Indian Claims Commission determining the relative interest of two groups of Sioux Indians — the Tetons and the Yanktons — in some 60 million acres recognized as Sioux territory by the first Treaty of Fort Laramie in 1851. The issue arises because, in 1858, the Yankton Sioux ceded their interest in these lands to the United States for what has been determined to be an inadequate

consideration and the amount of the award to the Yankton depends upon the extent of that interest.[1]

1. Initially, the Indian Claims Commission determined that the interest of each of the Sioux groups in all of the ceded lands should be determined on the basis of the total population of each group, and, applying that rule, it concluded that the Yanktons were entitled to a 17% share (Pet. App. 2e-3e). Both the United States and the Teton Sioux challenged this result in the Court of Claims. We argued for a geographical allocation of interests, which the court rejected (see Pet. App. 1d-2d). Although its opinion perhaps left the door ajar, the court seemed to require the Commission to assume that both groups of Sioux enjoyed some interest in all the lands recognized as

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[1]In 1978, the Indian Claims Commission valued the land in question, as of 1859 (when the 1858 treaty was ratified), at some $32.4 million and fixed the offsets allowable against the Yankton Sioux. See 43 Ind. Cl. Comm. 1, 72. Those determinations are now final, and the resulting award to the Yankton depends only on their proportional interest in these lands. Under the decision below, the award to the Yankton Sioux in respect of the subject lands would be $2,269,008.50; if, as the Commission originally found, that group held a 17% interest in the lands, the award would be increased by some $3.24 million.

The outcome of the present case will also affect the ultimate award to the Teton Sioux in respect of their cession to the United States of their interest in a large portion of the same lands by the second Treaty of Fort Laramie in 1868. The lands ceded by that 1868 treaty have been valued (as of that date) at $45,685,000 (Pet. App. 2a). After consideration of claimed "payments on the claim" and other offsets (which the Court of Claims, in this respect reversing the Commission, required to be determined, Pet. App. 3a-13a), the net award to the Teton Sioux will depend upon whether their retained interest in these lands was 83% (as the Commission originally found) or 93% (as the judgment below held).

belonging to that Nation by the 1851 Fort Laramie Treaty — regardless whether each group used all the lands — and that their respective interests must be determined on that basis (Pet. App. 2d-5d, 7d). This, at all events, is how the Commission understood the mandate (Pet. App. 3a-4a, 21a). However, the court accepted the Tetons' contention that the correct basis for assessing the interest of each group was not *total* population, but such number of Teton and Yankton as actually used the lands (see Pet. App. 1d-5d). Accordingly, the Commission was directed to determine, if possible, "the comparative population of the Teton and Yankton divisions of the Sioux actually using the Fort Laramie land" (Pet. App. 7d). If sufficient evidence was not available, the Court indicated that it would accept the Commission's previous allocation on the basis of total populations (*ibid.*).

Although the United States took no active part in the proceedings on remand, the Commission received voluminous evidence from the Sioux parties and made detailed findings (Pet. App. 23c-65c). However, after elaborating a number of reasons for finding the evidence ambiguous (Pet. App. 15c-20c), the Commission concluded: "Clearly, from the evidence we cannot determine whether all or simply a portion of the Yanktons or Tetons were involved in the use and occupancy activities [within the Fort Laramie treaty lands]" (Pet. App. 21c; see, also, Pet. App. 20c, 22c). The Commission therefore reverted to its previous apportionment of interest on the basis of total population (Pet. App. 22c).

2. The Tetons thereupon moved for rehearing and it was granted (Pet. App. 1b-2b). Asserting that it had initially misconstrued the remand order, the Commission now concluded that its earlier findings were "sufficient * * * to determine the approximate percentage of each

Sioux group that was using the Sioux-Fort Laramie lands" (Pet. App. 5b). Reciting indications as to how much time each Sioux band spent in the relevant area (Pet. App. 5b-6b), the Commission determined that "approximately * * * 25% of the Yanktons used and occupied the Sioux -Fort Laramie Lands," whereas larger portions of the various Teton bands did so (Pet. App. 6b). The result was a holding that the Yanktons enjoyed only a 7% interest in the lands (Pet. App. 7b).

3. The Yanktons appealed. Although characterizing as "unconvincing" "[t]he stated basis upon which the Commission granted rehearing" (Pet. App. 14a), the Court of Claims found no abuse of discretion, and concluded that "substantial evidence supports the Commission determination that the Yankton Sioux had a 7% interest in the land" (Pet. App. 14a-15a). Accordingly, the decision was affirmed (Pet. App. 15a). A motion for rehearing en banc was subsequently denied (Pet. App. 1f-2f).

DISCUSSION

The United States has no significant financial interest in the division of the aggregate award in this litigation between the contending Sioux groups.[2] Moreover, as

[2]Because, under the unchallenged findings of the Indian Claims Commission, the lands in question appreciated in value between 1858 (when the Yankton ceded their interest) and 1868 (when the Teton ceded their interest in a substantial portion of the same lands), the United States may be advantaged if the interest of the Yankton Sioux is determined to be greater. The net benefit of such a result, however, depends upon the extent to which offsets are ultimately allowed against the Teton claim. See note 1, *supra*. At all events, we do not now advance the relatively minor and conjectural consequence of the judgment below on the ultimate liability of the United States as a relevant factor in this Court's consideration of the present petition.

indicated, once the suggestion of a geographic allocation of interests was rejected, the government took no active part in this dispute. Nor have we reviewed all the evidence. In these circumstances, we are reluctant to express any views on the merits of the present controversy. Nevertheless, as a party to the case, we have deemed it our duty to examine the Commission's findings to assure ourselves that no patent injustice has been done, and we submit the following comments.

1. On the face of the decision of the Indian Claims Commission on rehearing and the opinion of the Court of Claims, no explanation is offered how a conclusion could be reached that any given percentage of the several Sioux bands used the relevant area. Petitioner's charge that "these were figures conjured from the air" (Pet. 6) is not without force, especially in light of the Commission's explicit and repeated finding that it could make no such determinations on the evidence. With respect to the Yanktons, the only arguably relevant statement in the Commission's last opinion is that they "spent most of their time east of the Missouri River [outside the subject area]," although "there was Yankton activity in the Sioux-Fort Laramie lands, particularly in that area close to the Missouri" (Pet. App. 6b). But that does not necessarily tell us *how many* members of the group used the area, however occasionally.

2. If the matter rested there, it might be difficult to support the result. But, in our view, there are, on the face of the findings and opinions now before the Court, sufficient indications that petitioners have not been unjustly treated.

First, as the Commission recited (Pet. App. 18c), "[i]t was conceded by both parties that the Yankton country was east of the Missouri River" — wholly outside the relevant area. Although they roamed and hunted elsewhere, the "home" of the Yankton Sioux, in contrast to most of the Teton bands, was beyond the territory which is the subject of this case (see, *e.g.*, Pet. App. 5c-6c, 7c, 10c, 13c-14c, 14c-15c, 17c, 18c, 19c, 25c, 26c, 29c, 34c, 37c, 41c, 41c-42c, 43c, 49c, 50c, 51c, 53c, 54c, 57c, 58c, 58c-59c, 61c, 62c, 63c, 64c). To be sure, the compensable interest of an Indian Tribe in land is not restricted to their "home base." But, in assessing the relative claims of the two groups in the same territory, it seems right to concede a greater interest to these who "live" on the land than to others who merely use it as a "range."

Second, because their "home" was outside the area, the Yankton spent relatively little time in the lands here in question. They were most often sighted outside the Fort Laramie lands. It appears that they entered the relevant area primarily to receive their provisions and supplies from the government (see Pet. App. 36c, 39c, 56c), or to trade (see Pet. App. 17c, 26c), or to hunt (see Pet. App. 7c, 29c). Indeed, the Commission was not sure whether the Yankton hunting activities were at all times within the treaty lands (see, *e.g.*, Pet. App. 7c n.2, 29c). But, even assuming that all the Yankton Sioux, with their families, joined in an annual or semi-annual pilgrimage west to obtain supplies or to hunt (see Pet. App. 7c, 29c, 36c), it may be appropriate to treat such occasional visits to the subject area as imparting a diminished interest only.

Third, it seems clear that the Yankton occupied, with any consistency, only a relatively small portion of the territory in question (see Pet. App. 10c, 20c). While the

Commission deemed this fact irrelevant under the remand order (Pet. App. 21c), it may well be that, in affirming the ultimate allocation of interests, the Court of Claims took this into account, and, in our view, it would have been entitled to do so.

Finally, the Commission noted that, before 1858, "the Yanktons had become less nomadic than in previous years, and were starting to lead a life based upon the cultivation of the soil, rather than a life dependent upon the chase" and that, accordingly, "their use of lands within the Sioux-Fort Laramie area was diminished" (Pet. App. 15c; see also Pet. App. 57c, 58c). Because the Commission was seeking to fix the interests of the two Sioux groups in the subject area as of *1851*, it gave no weight to this development. That may be correct. Yet, since the Treaty of 1851 did not purport to specify the relative interest of the several Sioux bands in the territory recognized as belonging to them all, it is not entirely clear that a claim arising from a cession of interest in *1858* should be unaffected by an intervening change of occupancy and use patterns. The finding that, to a significant degree, the Yankton Sioux had abandoned their former hunting grounds to other bands before they ceded their interest in those lands, is perhaps not wholly irrelevant in determining their proper share in the ultimate award.

3. Petitioners are entitled to say that none of these considerations were articulated by the Commission in reaching its ultimate conclusion; that the 7% interest in the treaty lands conceded to the Yankton Sioux was based solely on a determination not supported by the detailed findings — that only some [illegible]% of their total numbers in 1851 occupied or used any part of the

relevant area. Petitioners may add that the Court of Claims, in affirming, did not specify any different basis for its action, and that it earlier had directed the Commission to proceed as it did. In these circumstances, a remand might seem appropriate.

On the other hand, it is to be noted that the Court of Claims expressly affirmed only the result, not the Commission's reasoning. Indeed, one may doubt whether the Commission itself did not articulate its conclusion in the way it did because it felt bound by the Court's earlier direction. At all events, it appears that the detailed findings entered by the Commission would justify an award perhaps no more generous to petitioners — albeit on somewhat broader grounds. If that is so, this Court may deem it unnecessary to require further proceedings in this already very protracted litigation.

Respectfully submitted.

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Solicitor General

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